

Editor's note: Appealed, sub nom. Portland Audubon Society v. Hodel, Civ.No. 87-1160 FR; dismissed (D.Or. Apr. 20, 1988); remanded to district court, 866 F.2d 302 (9th Cir. 1989); dismissed, (D.Ct. May 19, 1989), 712 F.Supp. 1456; injunction reimposed, (9th Cir. June 7, 1989); held no jurisdiction, 884 F.2d 1233 (9th Cir. 1989); dismissed (D.Or. Dec. 21, 1989); petition for cert denied, No. 89-931 (Mar. 19, 1990), 110 S.Ct. 1470

HEADWATERS, INC., ET AL.

IBLA 87-477

Decided February 29, 1988

Appeal from a decision by the Oregon State Director, Bureau of Land Management, declining to prepare a supplemental environmental impact statement to examine the effects of timber harvesting on spotted owl habitat sites.

Affirmed.

1. Administrative Procedure: Generally--Environmental Policy Act--  
Environmental Quality: Environmental Statements--National  
Environmental Policy Act of 1969: Environmental Statements

The Board of Land Appeals has jurisdiction to review a decision by BLM not to prepare a supplemental environmental impact statement pursuant to 40 CFR 1502.9(c)(1)(ii).

2. Administrative Procedure: Generally--Appeals: Jurisdiction--Board of  
Land Appeals--Contests and Protests: Generally--Rules of Practice:  
Protests

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600.

3. Administrative Procedure: Generally--Appeals: Jurisdiction--Board of  
Land Appeals--Rules of Practice: Appeals: Generally

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction. The Board will not consider challenges to policy statements issued by BLM, or give opinions on abstract propositions.

4. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

BLM's decision not to prepare a supplemental environmental impact statement in accordance with 40 CFR 1502.9(c)(1)(ii) will be affirmed if such decision is reasonable, depending upon such factors as (1) the environmental significance of the new information, (2) the probable accuracy of the information, (3) the degree of care with which it considered the information and evaluated its impact, and (4) the degree to which BLM supported its decision not to supplement with a statement of explanation or additional data.

APPEARANCES: Victor M. Sher, Esq., and Todd D. True, Esq., Seattle, Washington, for Headwaters, Inc., Siskiyou Audubon Society, Portland Audubon Society, Rogue Valley Audubon Society, Salem Audubon Society, Central Oregon Audubon Society, Natural Resources Defense Council, The Wilderness Society, Sierra Club, Inc., and Umpqua Audubon Society; Michael D. Axline, Esq., Eugene, Oregon, for Lane County Audubon Society and Oregon Natural Resources Council; C. Don Fisher, Esq., Portland, Oregon, for Northwest Forest Resource Council; John C. Ramig, Esq., Washington, D.C., for the Association of O&C Counties; and Donald P. Lawton, Esq., and Roger W. Nesbit, Esq., Office of the Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

By notices of appeal filed on May 11, 1987, Headwaters, Inc., Siskiyou Audubon Society, Portland Audubon Society, Rogue Valley Audubon Society, Natural Resources Defense Council, Oregon Natural Resources Council, and Lane County Audubon Society appeal from a decision of the Oregon State Director, Bureau of Land Management (BLM), dated April 10, 1987, declining to prepare a supplemental environmental impact statement (EIS) to examine the effects of timber harvesting on spotted owl habitat sites. By notice of appeal filed on May 18, 1987, the Salem Audubon Society, Central Oregon Audubon Society, and Wilderness Society appeal from the identical decision of the State Director. By order dated October 13, 1987, the Board granted the requests of the Northwest Forest Resource Council (NFRC) and the Association of O&C Counties (O&C Counties) to intervene in this appeal. <sup>1/</sup>

During the period 1979-1983, BLM completed seven Timber Management Plans (TMP's) for the Salem, Eugene, Coos Bay, Roseburg, and Medford Districts in western Oregon. BLM examined the environmental effects of

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<sup>1/</sup> On June 10, 1987, a notice of intervention was filed by Sierra Club, Inc., and Umpqua Audubon Society. No opposition to this notice was filed. Accordingly, the intervention is hereby granted.

harvesting old growth timber upon spotted owl habitat sites in seven EIS's which accompany the seven TMP's.

In response to "the fact that interest groups and other agencies are continuing to express concern about the spotted owl survival question," BLM prepared a Spotted Owl Environmental Assessment (SOEA), dated February 3, 1987, "to determine if there is significant new information concerning the northern spotted owl which is relevant to environmental concerns and the selected alternatives reflected in the seven western Oregon TMP's" (SOEA at 3). BLM characterized the SOEA as "an analysis of whether any new habitat standards, suggested by research made available since the original EISs, would significantly change the conclusions regarding effects on the spotted owl described in the original EISs." Id.

Following circulation of the SOEA for public comment, the Oregon State Director, BLM, issued the Decision Record, dated April 10, 1987, concluding that "the research information now available does not warrant re-examination of the impacts through a supplemental EIS" (Decision Record at 3). He reached this conclusion on the basis that "[t]he new information, as it relates to impacts of BLM timber harvest on spotted owl habitat sites during 1987-1990, is not significantly different from that analyzed in developing most of the current timber management plans." Id. The State Director's decision noted that in 1986 BLM started developing new resource management plans (RMP's) for the five districts involved in this appeal, and that "[d]raft RMP's and EIS's are scheduled to be available for public review by October 1, 1989." Id. at 2. Thus, the State Director concluded that "it would not be appropriate nor serve any worthwhile purpose to supplement any of the seven timber management EISs to further address this issue, and that implementation of the current BLM land-use plans (management framework plans) and timber management plans should continue until new land-use plans (resource management plans) currently in preparation are completed." Id. at 3. 2/

In their statement of reasons (SOR), appellants challenge BLM's Decision Record on three bases. First, they contend that BLM violated the National Environmental Policy Act (NEPA), 42 U.S.C. | 4332 (1982), by failing to prepare adequate EIS's for the five districts involved, and then compounded such failure by not supplementing those EIS's when significant new information became available. In this connection, appellants argue that because the original EIS's are inadequate, BLM's subsequent "Finding of No Significant Impact on decisions to log individual timber sales which tie to the EISs are themselves flawed for they fail to consider adequately the

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2/ We note that in Instruction Memorandum (IM) No. OR-87-349 (Apr. 10, 1987), the Oregon State Director, BLM, instructed BLM District Managers to mitigate the effects of timber harvesting on spotted owls subsequent to his decision not to prepare a supplemental EIS. Further, he stated that when District Managers "prepare site specific or annual plan timber sale EA's \* \* \* they must \* \* \* acknowledge and address any effects on owl habitat from the proposed actions in [those] EA's" (IM No. OR-87-349 (Apr. 10, 1987)).

biological consequences to old-growth forest species, including the northern spotted owl" (SOR at 3-4). Second, appellants assert that BLM's decision to "liquidate" old-growth forests violates the Act of August 28, 1937 (O&C Act), 43 U.S.C. §§ 1181a-1181f (1982), and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1982), on the basis that BLM's O&C Forest Resources Policy "prohibits excluding lands suitable for commercial timber cutting from the timber base even to protect other important forest uses (such as wildlife habitat) \* \* \*" (SOR at 4). Third, appellants allege that "by permitting destruction of northern spotted owl habitat by logging, BLM is illegally permitting the 'killing' and 'taking' of a species protected by the Migratory Bird Treaty Act (MBTA) 16 U.S.C. § 704 [(1982)]" (SOR at 4).

[1] As a preliminary matter, we will delineate the scope of the Board's jurisdiction to resolve the issues raised by appellants in their SOR. On October 13, 1987, the Board issued an order denying motions filed by BLM, the O&C Counties, and NFRC, that it dismiss this appeal for lack of jurisdiction. Specifically, BLM, the O&C Counties, and NFRC contended that the BLM decision at issue involves "a request for amendment of a management framework plan or a resource management plan, [and] is reviewable only under 43 CFR Part 1600 \* \* \*" citing Harold E. Carrasco, 90 IBLA 39, 42 (1985). In its October 13, 1987, order, the Board ruled that it has jurisdiction to review a decision by BLM not to prepare a supplemental EIS. 40 CFR 1502.9(c)(1)(ii). See Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 94 I.D. 35 (1987); Lane County Audubon Society, 85 IBLA 185 (1985); and National Wildlife Federation, 62 IBLA 73 (1982).

On November 13, 1987, BLM filed a petition for reconsideration of the Board's October 13, 1987, order. In its petition for reconsideration, BLM renewed its assertion that "this appeal is in reality a challenge to BLM's planning decisions" (Request for Reconsideration at 1). In its December 14, 1987, order denying BLM's request for reconsideration, the Board discussed the applicability and scope of the Department's regulations governing challenges to a resource management plan. The Board's explanation of why it has jurisdiction to review BLM's decision not to prepare a supplemental EIS places many of the arguments advanced by appellants beyond the Board's jurisdiction:

We disagree with BLM's characterization of its decision as a decision not to consider amendment of its timber management plans. Rather, we view BLM's decision as one declining to prepare a supplemental EIS, which, if prepared, may or may not result in amendment of the timber management plans. Thus, the issue is not whether the Board has jurisdiction to consider BLM's refusal to amend a resource management plan, but whether it has jurisdiction to consider BLM's refusal to prepare a supplemental EIS which may result in such amendment, depending upon BLM's evaluation of the "significant new information" regarding the spotted owl.

We have reviewed the protest procedures embodied in the regulations cited by BLM, and conclude that they are not applicable to the instant appeal. The regulation at 43 CFR 1601.6-1(d)(1), in effect until BLM's final rulemaking on May 5, 1983, provided that "[a]ny person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment." The amended regulation, 43 CFR 1610.5-2(a) (1983), is identical.

The 1983 amendments to those regulations did not address, and therefore did not affect, the Board's authority to review matters of BLM's compliance with NEPA in a context separate from approval or amendment of a resource management plan. Both the prior and the current protest procedures address the approval or amendment of a resource management plan. BLM's decision not to prepare a supplemental EIS does not constitute an approval or an amendment of the underlying resource management plans. Nor is the decision under review one denying a request to amend a plan which the Board held in Harold E. Carrasco, supra, was subject to review only in accordance with 43 CFR 1610.5-2(a). We therefore conclude the instant appeal is not within the scope of 43 CFR 1610.5-2(a).

(Order dated Dec. 14, 1987, at 1-3).

[2] While the Board has jurisdiction to review BLM's decision not to prepare a supplemental EIS, it does not have jurisdiction to review the adequacy of the underlying EIS's. Departmental regulations governing protest procedures provide as follows:

(a) Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process.

(1) The protest shall be in writing and shall be filed with the Director [BLM]. The protest shall be filed within 30 days of the date the Environmental Protection Agency published the notice of receipt of the final environmental impact statement in the Federal Register. For an amendment not requiring the preparation of an environmental impact statement, the protest shall be filed within 30 days of the publication of the notice of its effective date.

43 CFR 1610.5-2(a)(1) (1983). The previous version of this regulation, as noted in the Board's December 14, 1987, order was identical, except that it provided for initial protest to the State Director, with the decision of the State Director subject to appeal to the Director of BLM.

Regulation 43 CFR 1601.0-6 provides that "[t]he environmental analysis of alternatives and the proposed plan shall be accomplished as part of the resource management planning process, and wherever possible, the proposed plan and related environmental impact statement shall be published in a single document." The regulations prior to the 1983 amendments provided that "[p]ublication of the final plan and final environmental impact statement \* \* \* triggers the opportunity for protest \* \* \*." 43 CFR 1601.3(e)(4) (1979). The current regulation provides that "[p]ublication of the proposed resource management plan and final environmental impact statement \* \* \* triggers the opportunity for protest \* \* \*." 43 CFR 1610.2(f)(4) (1983). Appellants should have complied with these protest procedures in challenging the seven EIS's involved herein. Preparation of the EIS's was part of the planning process under 43 CFR 1601.0-6. Appellants cannot challenge the EIS's in the present proceeding.

For the same reason, the Board concludes that it is without jurisdiction to address appellants' argument that because the original EIS's are inadequate, BLM's subsequent "Findings of No Significant Impact" with respect to individual timber sales which tier to the EIS's are likewise flawed.

[3] The Board does not have jurisdiction to consider appellants' challenge to BLM's O&C Forest Resources Policy, dated 1983, in which BLM sets forth its "policy for management" of O&C lands situated in Oregon. BLM's 1983 policy statement regarding O&C lands does not constitute a decision which is appealable to the Board. In State of Alaska, 85 IBLA 170, 172 (1985), the Board observed that it "does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction." Moreover, the Board stated that its duty is "to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions." 85 IBLA at 172. We will apply that rule here.

Appellants' third argument, that BLM is in violation of the MBTA, 16 U.S.C. § 701 (1982), by allowing the destruction of the northern spotted owl habitat by logging is subject to the same disposition. The MBTA states that "it shall be unlawful at any time, by any means or in any manner to \* \* \* kill or possess \* \* \* any migratory bird [or] any \* \* \* nest or egg of any such bird." 16 U.S.C. § 703 (1982). According to appellants, the destruction of old-growth forests involves "killing" spotted owls within the meaning of the MBTA (SOR at 37). While they make a general allegation that BLM is in violation of the MBTA, appellants do not allege that the decision presently on appeal to the Board, *i.e.*, the decision not to prepare a supplemental EIS, violates the MBTA. We conclude that BLM's compliance with the MBTA is not properly raised in the instant appeal.

[4] As the Board ruled in its October 13 and December 14, 1987, orders, we do have jurisdiction to consider the propriety of BLM's decision not to prepare a supplemental EIS to consider information which appellants claim is "new" and "significant" under 40 CFR 1502.9(c)(1)(ii). A Federal agency has a continuing duty to gather and evaluate new information relevant

to the environmental impact of its actions after the release of an EIS. Oregon Natural Resources Council v. Marsh (Marsh), 820 F.2d 1051, 1056 (9th Cir. 1987); Stop H-3 Association v. Dole (Stop H-3), 740 F.2d 1442, 1463 (9th Cir. 1984); Warm Springs Dam Task Force v. Gribble (Gribble), 621 F.2d 1019, 1023-24 (9th Cir. 1980). Regulations promulgated by the Council on Environmental Quality require agencies to "prepare supplements to either draft or final environmental impact statements if \* \* \* [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR 1502.9(c)(1)(ii).

In Gribble, the Ninth Circuit Court of Appeals addressed the central issue of whether the Army Corps of Engineers was required to supplement a supplemental EIS when it became aware of a Geological Survey study indicating that the Maacama Fault, which at its closest point is 6 miles from the Warm Springs Dam, might be capable of generating an earthquake of greater magnitude than the dam was designed to withstand. The Ninth Circuit acknowledged that 40 CFR 1501.9(c)(1)(ii) does not in itself "provide a suitable standard for reviewing an agency's decision not to supplement an EIS in light of new information." 621 F.2d at 1024. However, the Ninth Circuit articulated the following criteria to be applied in determining whether an agency's decision not to supplement an existing EIS is justified:

[T]he standard applied in reviewing an agency's decision not to file an EIS in the first instance is appropriate here as well; the decision will be upheld if it was reasonable. When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. [Citations omitted.]

Id. The Court stated that a study prepared by Geological Survey raised sufficient environmental concerns that the Corps was required to take another hard look at the issues, and that neither the EIS nor the supplemental EIS addressed the questions raised by the study. Nevertheless, the court concluded that based on a subsequent study by the Corps, it was reasonable for the Corps to "conclude, as it did, that the potentially adverse environmental effects disclosed by the [Geological Survey] report were not significant and did not require preparation and circulation of a formal supplement" to the supplemental EIS. Id. at 1026. See also Stop H-3, supra at 1463-65 (supplemental EIS not required under 40 CFR 1502.9(c)(1)(ii)).

In Marsh, the Ninth Circuit considered whether the Corps violated NEPA, 42 U.S.C. § 4332 (1982), by failing to prepare a second supplemental EIS taking into account new information acquired since the original EIS was

prepared in 1980. Applying the criteria set forth in Gribble, and followed in Stop H-3, the Ninth Circuit concluded that subsequent to the preparation of the final supplemental EIS, two studies became available which provided significant new information regarding the environmental impacts of construction of a dam in southern Oregon. The Oregon Department of Fish and Wildlife (ODFW) concluded in the first study that the project could result in decreased survivability of chinook salmon, higher turbidity, increased disease potential in fish, and decreased prospects for lure and fly fishing. The U.S. Soil Conservation Service, in the second study, found a greater turbidity potential than indicated by the first supplemental EIS. The reasoning of the Ninth Circuit in concluding that these studies provided significant new information is helpful in our evaluation of whether appellants are correct in their argument that BLM should have prepared a supplemental EIS in the instant case. The Ninth Circuit stated:

The Department presented new information as a result of its study of Lost Creek Dam's impact on the river. Although the evidence is not conclusive, it presented a legitimate concern about decreased survivability of fish and the potential for higher turbidity based on information from the two studies that was not available at the time the final supplemental EIS was published. The evidence clearly is environmentally significant under the Stop H-3 Ass'n test.

The information must be more than environmentally significant. It must be "probably accurate" as well. Stop H-3 Ass'n, 740 F.2d at 1464. Based on our review of the experts' testimony and data, we believe that, at the very least, some of the proffered information is probably accurate.

820 F.2d at 1057. The Court directed the Corps to prepare a supplemental EIS.

Appellants dispute the April 10, 1987, decision of the Oregon State Director, BLM, in which he concludes that "the research information now available does not warrant re-examination of the impacts through a supplemental EIS" (Record Decision at 3). According to appellants, "[a] significant amount of additional new information about the effects of old-growth liquidation has been generated since the TMP's were prepared" (SOR at 10). Appellants assert that the SOEA, dated February 3, 1987, "ignores the most significant new information available and instead superficially reviews innocuous information." (Footnote omitted.)

In appellant's view, a report prepared in 1985 by Dr. Russell Lande, an associate professor of biology at the University of Chicago, meets the criteria of 40 CFR 1502.9(c)(1)(ii). In that report, Dr. Lande concluded that "any additional old-growth logging was likely to seriously jeopardize the long term viability of the northern spotted owl" (SOR at 12). See Lande, Report on the Demography and Survival of the Northern Spotted Owl (Lande Report) (June 1985) (unpublished manuscript) (Exh. 1 to SOR) at 23 and 26. Appellants submit affidavits of Dr. Paul Ehrlich of Stanford



University and Dr. Gordon Orians of the University of Washington, who agree that Dr. Lande's "conclusions regarding the risk of extinction faced by the northern spotted owl are reasonable on the basis of the existing scientific data. Though additional data would be useful, the existing information is sufficient to conclude that the northern spotted owl faces extinction if its habitat continues to be logged" (SOR at 13; see Affidavits of Dr. Orians and Dr. Ehrlich at 1, Exhs. 2 and 3 to SOR). Appellants conclude that BLM's failure to consider Dr. Lande's report in determining whether there is significant new information on the impacts of logging old-growth forests violates 40 CFR 1502.9(c)(1)(ii).

Additionally, appellants argue that BLM's SOEA fails to discuss or refer to a number of "important reports and recommendations," including a report by a panel convened by the National Audubon Society, a draft supplemental EIS prepared by the Forest Service, a U.S. Fish and Wildlife Service report on the northern spotted owl, a petition to list the spotted owl as an endangered species, an ODFW policy statement calling for significantly more protection for old-growth than is provided in the TMP's, a 1984 ODFW determination that BLM's old-growth logging is inconsistent with Oregon's Coastal Management Plan, a 1985 report entitled "The Ecology and Management of the Spotted Owl in the Pacific Northwest," and a recommendation from an inter-agency task force that the amount of acreage allocated for owl habitat be expanded. Appellants assert that "[e]ach of these sources contains new information or management standards developed only after the 1980 decadal TMP's became final" (SOR at 15). Moreover, according to appellants, "all of the documents agree that the steps taken in the TMP EIS's to protect spotted owl habitat are inadequate." Id. These documents, in appellants' view, "when taken together with [Dr. Lande's report], present a range of alternatives for addressing the spotted owl problem." Id.

We now address the question of whether BLM's decision not to supplement the seven EIS's was reasonable under the criteria of Gribble, Stop H-3, and Marsh. Dr. Lande's report, dated June 1985, while new in the sense that it was prepared subsequent to the publication of the EIS's and TMP's, does not necessarily contain "new" and "significant" information for purposes of 40 CFR 1502.9(c)(1)(ii). As pointed out by NFRC in its answer, "[a] published report that essentially confirms the same trend in environmental effects is not significant new information" (NFRC's Answer at 4). In Humane Society of the United States v. Watt, 551 F. Supp. 1310 (D.D.C. 1982), aff'd mem., 713 F.2d 865 (D.C. Cir. 1983), the plaintiffs filed suit to force the U.S. Fish and Wildlife Service to prepare a supplemental EIS to evaluate the impacts of hunting upon the black duck population. The court held that a supplemental EIS was not required because "[t]he decline in the population of black duck is old news, and the reasons for the decline are still subject to debate." 551 F. Supp. at 1332.

BLM prepared the SOEA in response to "the fact that interest groups and other agencies are continuing to express concern about the spotted owl survival question" (SOEA at 3). As shown below, other studies, while reflecting a general concern with the spotted owl survival problem, display

confusion about what protective steps are necessary to prevent further decline of the spotted owl population.

Dr. Lande's report itself reflects the speculative nature of available information concerning the spotted owl. He states: "From the available information on the life history and demographic characteristics of this species, I conclude that under current conditions the populations of the spotted owl may already be declining and in danger of extinction within the next century" (Lande Report at 1). He predicts that "[f]urther habitat alteration, as planned by the U.S. Forest Service, is very likely to cause extinction of the spotted owl from the management area on a shorter time-scale." Id. However, predictions concerning the extinction of the spotted owl are based upon demographic life-history data which he admits "cannot be considered definite without more complete data." Id. at 12. Moreover, he states that "standard demographic analysis does not allow us to predict the likely effect of future environmental changes on population numbers." Id.

BLM, NFRC, and the O&C Counties all question the accuracy of Dr. Lande's conclusions. BLM quotes extensively from the Forest Service's draft supplemental EIS, one of the "important reports and recommendations" which appellants argue was not considered by BLM. BLM states that in this draft EIS the Forest Service undertakes a demographic analysis similar to that performed by Dr. Lande. According to the Forest Service, the available information would suggest a "significant decline in the owl population," but that such a conclusion is "inconsistent with the much smaller rate of decline actually observed by field researchers" (BLM's Response at 6). As quoted by BLM, the Forest Service states in its draft EIS at pages 4-23, 4-24:

Variations in birth and death rates. In all alternatives, the greatest risk to owl populations appears to be the risk from reduction in habitat combined with low birth and survival rates and from random variations in those rates. The possible severity of this risk to the owl population is displayed by Figure 4-2. This figure is a projection of the owl population generated by using the currently reported information on owl birth and survival rates. It suggests total extinction of the northern subspecies in 20 to 30 years, even if habitat is not further reduced. It is similar to the prediction made by Lande (1985) that was based on demographic information available at the time of his analysis. [Emphasis original.]

Other evidence is available that suggests that the spotted owl population is not declining as rapidly as depicted in Figure 4-2. It is estimated that the spotted owl population in western Oregon has been declining about 1.1 percent per year over the past decade. (Refer to Appendix C., page C-5.) This rate of decline could be attributed largely to habitat reduction. It suggests that the average birth and survival rate of the population have been more favorable during the last ten years than

the observed rates used to generate the curve displayed in Figures 4-2.

(BLM's Response at 6, 7).

In addition, BLM quotes from the Audubon Society Report of the Advisory Panel on the Spotted Owl, May 1986, (Audubon Panel Report), another of the documents which appellants assert BLM should have considered in determining whether to supplement the seven EIS's, as demonstrating "that not enough reliable scientific information is available to make meaningful demographic predictions concerning the survival of the spotted owl" (BLM's Response at 8). In this report, the Audubon Panel points out how little is known about juvenile survival:

What is known about Spotted Owl demography in the Pacific Northwest and northwest California? Juvenile survival is particularly poorly known. Marcot, ["Sufficiency of Statistics of Northern Spotted Owls for Audubon Advisory Panel" (unpublished manuscript) Dec. 5,] (1985) suggested that the meager literature on first-year mortality of Spotted Owls (including pre-dispersal fledgling mortality) indicates 39% death total during these stages. Mortality during dispersal was estimated as 80% so that total first-year survivorship is 12%. However, these estimates are based on only 136 and 33 birds, respectively (E.C. Meslow pers. comm.), and there is reason to think that many of the data were gathered during particular bad years. Barrowclough and Coats ["The Demography and Population Genetics of Owls, with Specific Reference to the Conservation of the Spotted Owl (*Strix Occidentalis*), "Ecology and Management of the Spotted Owl in the Pacific Northwest, R. Gutierrez and A. Carey, eds.] (1985) used the estimate of 19%, based on fewer data.

Yearly adult survival is also not well known. Barrowclough and Coats (1985), using data from only 26 birds tracked for 4 months to 3 years, and assuming an exponential distribution of adult lifespan, estimated yearly adult survival as 85%, a figure accepted by Marcot (1985) and Marcot and Holthausen ["1986 Spotted Owl Viability Analysis-Process Documentation for Regional Guide Supplement," Pacific Northwest Region, U.S. Forest Service (unpublished manuscript) Feb. 19,] (1986).

(Audubon Panel Report at 16, Exh. 15 to Appellants' SOR).

BLM further points out that both the Forest Service's draft EIS and the Audubon Panel Report raise questions about whether data on juvenile survival may have been "influenced by the fact that it was necessary to place radio transmitters on the birds to be studied" (BLM's Response at 9). The Forest Service asserts that the use of "radio transmitters may have adversely affected the birds survival" (Forest Service, Draft EIS, at B-25). The Audubon Society recommended "against the use of radio-transmitters on juvenile spotted owls because of uncertainty about the effects of these

devices on juvenile survivorship" (Audubon Panel Report at 29, Exh. 15 to Appellants' SOR).

Similarly, NFRC questions the accuracy of the Lande theory of juvenile survivorship, concluding that "[t]he information about spotted owls reflects the search for, rather than the discovery of, the truth" (NFRC's Answer at 7). NFRC provides a discussion of "several wildlife biologists and a review of some of the recent research [to] show that the information about spotted owls and their habitat requirements is far from accurate and conclusive." *Id.* For example, NFRC cites the statement of Jack Ward Thomas, Forestry Chronicle, 383, 385 (Aug. 1986), regarding the accuracy of spotted owl information:

Management plans have been done and redone; legal appeals filed; environmental impact statements done and redone at significant costs in money, personnel, time and delays; special 'blue ribbon panels' convened; and crash research programs instituted. The knowledge necessary to make management decisions with a high degree of certainty is still not available. \* \* \* The point is, the scientific basis for managing wildlife is weak and must be improved.

NFRC correctly points out that the symposium, Ecology and Management of the Spotted Owl in the Pacific Northwest, R. Gutierrez and A. Carey, eds. (Ecology and Management) (1985), does not reflect a consensus on the spotted owl survival question. For example, one author states that "[t]heoretical constructs for defining dependencies of species on particular types of environments or elements of the landscape are not yet supported by successful application to real situations" (Carey, "A Summary of the Scientific Basis for Spotted Owl Management," Ecology and Management at 109, Exh. 20 to Appellants' SOR). With regard to the role of genetics in spotted owl study and management, Carey states:

[V]ery little is known about the role genetic events play in wild populations. For this paper, I applied concepts of dependency to the problem of ensuring the continued existence of spotted owls in the Pacific Northeast. Shaffer, ["The Meta-population and Species Conservation: the Special Case of the Northern Spotted Owl," (Ecology and Management at 86)] applies the concept of minimum viable populations to spotted owl management. Barrowclough and Coats, ["The Demography and Population Genetics of Owls, with Specific Reference to the Conservation of the Spotted Owl (*Strix Occidentalis*)," (Ecology and Management at 74)] examine spotted owl management from a population genetics standpoint. It is evident from these three papers that long-term, empirical, demographic studies will be necessary if there are to be definitive answers to questions about the viability of spotted owl populations. But the need for further development of theory and concepts is also evident.

Carey, "A Summary of the Scientific Basis for Spotted Owl Management," Ecology and Management at 109-10.

Finally, NFRC asserts that "the theoretical assumptions about spotted owl habitat requirements are inconsistent with the owls actual use of habitat" (NFRC's Answer at 9). In a final report entitled "Spotted Owls in Harvested Areas Adult Monitoring Project," Oregon Cooperative Wildlife Research Unit, Department of Fisheries and Wildlife, Oregon State University (Mar. 15, 1986), at 1, Dr. E. Charles Meslow provides the results of a study the objectives of which "were to locate nesting spotted owls in areas managed extensively for timber harvest, evaluate the available habitat, and to determine the owl's habitat use." Meslow reviewed studies which conclude that old-growth forests is the "preferred" or "required" spotted owl habitat. For example, according to Forsman, Meslow & Wight, "Distribution and Biology of the Spotted Owl in Oregon," 87 Wildlife Monogram 1 (1984), selective logging decreases the suitability of old-growth stands for spotted owl foraging. However, owls responded to cutover areas by either moving to more suitable adjacent habitat or they simply "disappeared." Forsman, Hron, and Neitro, "Spotted Owl Research and Management in the Pacific Northwest," 47 Trans. N. Am. Wildlife Nat. Resource Conf. 343 (1982). Meslow concludes:

[S]ome of the owls on the Medford District were found in sites which lacked large blocks of old growth; all the sites we studied had been subjected to timber harvest varying from direct activity in the nest area to logging in adjacent roost and foraging areas. After logging, successive surveys found the owls not only remaining in the area but nesting and successfully fledgling young. This combination of limited old-growth forest logging impact, and continued presence of owls was in contrast to earlier work by Forsman (1980) and Solis (1983) and prompted the initiation of this project.

Final Report, "Spotted Owls in Harvested Areas Adult Monitoring Project," Oregon Cooperative Wildlife Research Unit, Department of Fisheries and Wildlife, Oregon State University (Mar. 15, 1986) at 1. In addition, Meslow asserts that the number of acres of old growth forest necessary to support a pair of spotted owls is actually less than a thousand acres, and that there are more owls than originally thought.

Under Marsh and Stop H-3, information must be more than new and environmentally significant. It must also be "probably accurate." In the case at hand, even if we were to find appellants' information new and environmentally significant, the indefinite and speculative nature of such information, together with substantial contradictory information in the record, preclude a finding that the information is "probably accurate."

We find that BLM's consideration of appellants' information and its reasons given in support of its decision meet the criteria set forth in Gribble, Stop H-3, and Marsh. Therefore, we conclude BLM's April 10, 1987, decision not to prepare a supplemental EIS to further address the impacts of timber harvesting on the northern spotted owl was reasonable and proper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 10, 1987, decision of the Oregon State Director, BLM, is affirmed.

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John H. Kelly  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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Anita Vogt  
Administrative Judge  
Alternate Member